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In the Supreme Court of the United States

OCTOBER TERM, 1973

NOVAK PASALICH, Et Al.,

Petitioners,

vs.

NICK DRASKOVICH, Et Al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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The caption to Petitioners' Brief sets forth that Nick Draskovich, *et al.*, are the Petitioners and Novak Pasalich, *et al.*, are Respondents. This is incorrect and we have correctly listed the parties in our caption.

REFERENCE TO OPINIONS BELOW

This portion of the Petition omits the letter of opinion by the Judge of the Elkhart Circuit Court. The letter of opinion is set forth in the App. pp. 1-4.

At page 1 of the Petition, Petitioners refer to the denial by the Supreme Court of Indiana of their Petition for Rehearing and of the separate opinion of Judge Hoffman which Petitioners term "a dissenting opinion." It was not. Judge Hoffman, in his separate opinion, states that, "*Although I agree with the result reached in the opinion previously handed down* * * *, I am not in full accord with the reasoning therein." (Emphasis added.) Pet. App. p. 41.

JURISDICTIONAL STATEMENT

This Court has no jurisdiction to review the judgment of the Supreme Court of Indiana denying Petitioners' Petition to Transfer the opinion and decision of the Court of Appeals of Indiana. Petitioners failed to timely and properly raise the "federal" question they allege in their Petition, and the question raised by Petitioners is not a federal question.

Further, the opinion and decision of the Court of Appeals of Indiana carefully analyzed and correctly applied the church cases decided by this Court, and said opinion and decision in no way contravened the First and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

Respondents strongly disagree with the statement of the question presented as set forth in Petitioners' Petition. This statement paraphrases, out of context, a portion of dictum of the opinion of the Court of Appeals of Indiana. See Pet. App. p. 34. It is Respondents' position that the following questions are presented by Petitioners' Petition:

1. Whether the purported federal question sought to be reviewed was timely and properly raised by Petitioners?

2. Whether the question sought to be reviewed is a federal question?

3. Whether the application of *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871) by the Court of Appeals of Indiana in deciding this case, was in violation of the United States Constitution?

4. Whether the Indiana courts would reach a different result by application of "neutral principles of law," if *Watson* were overruled and states were *required* to apply "neutral principles of law"?

STATEMENT OF THE CASE

Petitioners' statement of the case omits relevant facts and Respondents take exception to much of Petitioners' terminology and phraseology.

A. The Hierarchical Structure of the Serbian Eastern Orthodox Church

The Serbian Eastern Orthodox Church is hierarchical in structure and this hierarchy is as follows: The Serbian Patriarch is the supreme head of the church and is elected by the Holy Assembly of Bishops. The Holy Assembly of Bishops (sometimes called the Holy Council of Bishops) is composed of all diocesan bishops and meets under the presidency of the Patriarch, as the highest hierarchical and legislative body of the church. The Holy Synod of Bishops is composed of the Patriarch and four diocesan bishops (elected by the Holy Assembly of Bish-

ops) as members and is the highest executive body of the church. The above-described bodies constitute the Patriarchate and are sometimes referred to as the "Mother Church." Under the Patriarchate as the head of the Serbian Eastern Orthodox Church are, as a part thereof, the dioceses with a diocesan bishop elected by the Holy Assembly at the head of each, and under each diocese are the parishes with their clergy. The local church involved in this controversy is the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana. It was a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada, a religious body (Diocese), and the Diocese was one of the dioceses of the Serbian Orthodox Church whose See is in Belgrade, Yugoslavia (Mother Church).

B. The Diocese, Its Reorganization, and the Defrockment of Dionisije

The dioceses of the Serbian Eastern Orthodox Church are geographical areas which are ecclesiastical and administrative units, each of which has one bishop as its head. In 1921 the Holy Assembly of Bishops established the Diocese of the United States and Canada and appointed its first administrator. In accordance with the canons, the constitution of the Mother Church and the Diocesan constitution, all subsequent bishops of the Diocese have been elected by the Holy Assembly and all subsequent administrators have been appointed by the Holy Synod. In 1927 the administrator convened a diocesan assembly which adopted a constitution, which constitution was ratified by the Holy Assembly. All amendments thereto which were adopted, were, as required, approved by the Holy Assembly. In 1935 the bishop of the Diocese (Bishop Mardary) created an Illinois religious corporation under the

name of the Serbian Eastern Orthodox Diocese for the United States of America and Canada for the sole purpose of receiving title to the real estate of the Diocese. The provisions of the Illinois Religious Corporation Act under which the corporation was organized does not permit any independent church corporation, but requires the corporation to be a part of a hierarchical religious organization. This corporation never elected any officers or board of directors, it did not adopt any by-laws and, of course, never adopted a constitution.

The number of parishes within the Diocese grew from about 26 at its inception to about 75 by 1962. The Diocesan Bishop, Dionisije, and its Council, on numerous occasions, requested of the Holy Assembly that the Diocese be reorganized and additional bishops appointed due to its size and the increased number of parishes it served.

The Holy Assembly appointed a delegation in September 1962 to come to the United States to examine and establish the need for two or three additional bishops for the Diocese. The delegation was also given the task of informing Bishop Dionisije of the fact that charges had been filed against him in the Holy Synod based upon accusations made by members of the clergy and laity of his Diocese. These charges alleged, among others, conduct unbecoming to his clerical rank and position, with particular reference to non-performance and negligent performance of official duties and schism.

On May 10, 1963, the Holy Synod ordered the initiation of procedures against Bishop Dionisije and temporarily suspended him from the administration of the Diocese until the charges could be investigated and adjudged. At the same time the Holy Synod appointed Archimandrite Fir-

milian, Dionisije's episcopal deputy, as administrator of the Diocese.

Also, on May 10, 1963, the Holy Assembly reorganized the Diocese into three new dioceses, i.e. the Middle Eastern American and Canadian Diocese, the Middle Western American Diocese (adding thereto the additional territory of South Africa) and the Western American Diocese (adding thereto the additional territories of Central and South America). The authority for this reorganization was based upon the canons and constitution of the Serbian Eastern Orthodox Church. On May 17, 1963, the Holy Synod appointed Archimandrite Firmilian as temporary administrator of the Middle Western American Diocese.

Following the investigation of Dionisije by the Holy Synod, the Holy Assembly, on July 27, 1963, relieved Dionisije of the duties of Diocesan Bishop, declared the Middle Western American Diocese vacant, and elected Archimandrite Firmilian as Diocesan Bishop of the Middle Western American Diocese.

An indictment was filed against Dionisije, trial was held, and on March 5, 1964, the Holy Assembly found Dionisije to be guilty and adjudged that he be defrocked and removed from the roll of the hierarchy of the Serbian Orthodox Church and be returned to the status of layman.

C. Local Parish Vote

In about June, 1963, the South Bend parish received two letters; one letter was from the Mother Church regarding its decisions to reorganize the Diocese and temporarily suspend Bishop Dionisije; and the other letter was from Dionisije stating that he was refusing to recognize these decisions.

On March 1, 1964, the membership of the local parish held a duly-called special meeting at which a motion was

made and carried that a special meeting be held on March 22, 1964, for the purpose of determining by vote whether the parish would adhere to the decisions of the Mother Church in reorganizing the church and suspending Dionisije or whether it would adhere to the views of Dionisije that the Mother Church had no authority to make these decisions.

At the duly-called membership meeting on March 22, 1964, the following resolution was unanimously adopted by a vote of 194 in favor and none voting against:

> "Be it Resolved, that the St. Peter and St. Paul Serbian Orthodox Church membership hereby rejects the resolution dated November 12, 1963, as adopted at the Sabor meeting in Libertyville, Illinois, and therefore, this church shall remain in continued unity, as in the past, with the Holy Synod, Holy Bishops Council and the Patriarch, thus recognizing as the bishop for this diocese the Right Reverend Bishop Firmilijan, as per orders, directives, and decisions of the Holy Bishops Council."

D. Proceedings in Indiana Courts

On August 28, 1964, the seven Petitioners filed an injunctive action against the Board of Trustees of the local parish seeking to prohibit the Board from doing any act which might tend to separate the local parish from the old Diocese.

The trial court unconstitutionally examined and interpreted the constitutions of the Mother Church and of the Diocese for the purpose of determining that the Mother Church was without authority to reorganize the Diocese. See App. pp. 3-5.

Respondents appealed this decision directly to the Supreme Court of Indiana because the Indiana rules in effect

at that time required appeal to the Supreme Court in all cases in which there was presented a question regarding rights guaranteed by the state or federal constitution. In this appeal Respondents took the position, among others, that the decision of the trial court violated the First Amendment to the federal constitution because the court became involved in a consideration of doctrinal and ecclesiastical matters which led to the erroneous decision on the merits that the Mother Church was without authority to reorganize the Diocese and that the property of the local church was to be under the use and control of those who recognized the old Diocese.

Subsequent to the filing of the appeal with the Supreme Court of Indiana and prior to oral argument, the Indiana rules were amended to give the Court of Appeals of Indiana jurisdiction over constitutional questions, and the Supreme Court of Indiana transferred the case to the Court of Appeals of Indiana. The Court of Appeals of Indiana entered an opinion adopting the approach of *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1871) reversing the decision of the trial court and remanding the case to the trial court for entry of judgment in favor of Respondents. Petitioners filed a petition for rehearing with the Court of Appeals of Indiana. The court denied this petition with Judge Hoffman voting to grant the petition and stating that he agreed with the result reached in the opinion but that he would use another approach, namely, "the church properties in the case at bar should be subject to the control of the voting members of the church and the majority decision of such members should have the control and use of the church properties." See Pet. App. p. 42. Petitioners petitioned the Supreme Court of Indiana for transfer of this case, and transfer was denied.

REASONS FOR DENYING THE WRIT

A. Petitioners Failed to Timely Raise the Purported Federal Question

Petitioners raise the purported federal question for the first time in this case in their Petition for Writ of Certiorari. Throughout the trial of this case and as their principal position in the trial court, the Court of Appeals of Indiana and the Indiana Supreme Court, Respondents have contended and argued that the constitutional doctrine of *Watson* v. *Jones* was to be applied in the determination of this case. In the trial of this case Petitioners took the position that *Watson* v. *Jones* was not the law of Indiana and throughout all state proceedings in the trial court, Court of Appeals of Indiana and Indiana Supreme Court, Petitioners contended there were no federal constitutional questions in this case. For example, in their original Brief on appeal, they stated "[a]nalysis shows that there is no constitutional issue in the record in this case." Subsequent to the opinion of the Court of Appeals of Indiana, Petitioners filed with the Court of Appeals a Petition for Rehearing En Banc, a copy of which is included in our App. at pp. 7-12. Under Indiana Rules of Appellate Procedure, the timely filing of a petition for rehearing is a procedural requisite for filing a petition to transfer to the Supreme Court of Indiana and thus obtaining an order from the highest court of the state. Indiana Rules of Procedure, A.P. 11 B. Nowhere in this Petition for Rehearing did Petitioners contend that the decision of the Court of Appeals of Indiana in any way violated the

United States Constitution. They mentioned the Constitution by asserting that the Court of Appeals of Indiana erred in *not* examining the constitutions of the Mother Church and of the Diocese to determine the authority of the Mother Church to reorganize the Diocese and asserted that such an examination would not have violated the First Amendment to the Constitution. This assertion in no way challenged the constitutionality of the opinion of the Court of Appeals of Indiana.

Following the denial of rehearing by the Court of Appeals of Indiana, Petitioners filed a Petition to Transfer with the Supreme Court of Indiana. Indiana Rules of Appellate Procedure provide that a petition to transfer may not raise any new matters not set forth in the petition for rehearing. Indiana Rules of Procedure, A.P. 11 B. The Petition to Transfer contended, among other things, that the Court of Appeals could have examined the constitutions of the Mother Church and the Diocese to determine whether the Mother Church had authority to reorganize the Diocese. Nowhere in their Petition to Transfer do Petitioners assert that the opinion and decision of the Court of Appeals violated the United States Constitution. Rather, Petitioners' complaint and contention was that the Court of Appeals did not extend itself to its constitutional limits in examination of church documents and determination of matters of church government. It is not until the instant Petition that Petitioners contend that the Court of Appeals transgressed into the "forbidden thicket" and that its decision was unconstitutional.

Accordingly, the Supreme Court of the United States does not have jurisdiction to review the judgment on writ of certiorari because the purported federal question was not timely and properly raised.

B. The Question Sought To Be Reviewed by Petitioners Is Not a Federal Question

The basic premise of Petitioners' position is that civil courts have unlimited power to examine the constitution of the Mother Church, the constitution of the Diocese and the by-laws of the local parish for the purpose of determining whether the Mother Church has ecclesiastical or administrative authority to reorganize the Diocese. From this premise they conclude that the failure of the Court of Appeals of Indiana to examine these church documents for this purpose results in an unconstitutional decision. Stated another way, Petitioners' "constitutional" question is not that the Court of Appeals entered the "forbidden thicket" and became involved in constitutionally forbidden ecclesiastical matters, but rather their "constitutional" question is based upon their contention that the Court of Appeals stayed *too far removed* from this "thicket" by refusing to examine the church documents for the purpose urged by Petitioners. This interpretation of the decisions of the United States Supreme Court is totally erroneous. We are unaware of any case, and Petitioners have cited none, which has held that in a church property dispute it is a violation of the Constitution for a court to make a decision without going to the limits which the Constitution permits in examining church documents. To the contrary, this Court has made it crystal clear that there are alternative methods and doctrines which courts may apply in resolving church property disputes, so long as their application does not require inquiry into doctrinal issues.

C. The Court of Appeals of Indiana Properly Applied Watson v. Jones and Subsequent Decisions of this Court

Assuming solely for the sake of argument that this Court should determine that Petitioners have properly and timely raised a federal question, Respondents, without waiving the foregoing jurisdictional issues, will consider in this portion of the Brief the opinion of the Court of Appeals of Indiana.

1. Decisions of the United States Supreme Court

The question regarding the role of civil courts with respect to questions involving church matters has been before this Court numerous times.

In 1871 this Court decided the case of *Watson* v. *Jones* 80 U.S. (13 Wall.) 679 (1871) which is the landmark case in the United States concerning church law. In this case the Court made a basic distinction between churches in which individual parishes are independent and churches with hierarchical organization. In the case of hierarchical churches (such as the Serbian Orthodox Church), the Court held that rulings of the highest church authorities are not subject to review at the suit of individuals or local parishes. This rule was laid down as a means of protecting freedom of religious association, the freedom of churches to adopt and maintain their own policy.

The following is the passage in Justice Miller's opinion establishing the basic distinction between types of churches:

> "The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by con-

siderations applicable to a church established and supported by law as the religion of the state.

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owed no fealty or obligation to any higher authority.

"3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general or ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization." *Id.* at 722.

After explaining paragraphs 1 and 2, the opinion discussed the limited jurisdiction of courts in disputes concerning hierarchical churches:

"In this class of cases [the third] we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our systems of laws, and supported by a preponderating weight of judicial authority is, that, *whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.*" (Emphasis added.) *Id.* at 726.

Subsequently, this Court gave constitutional significance to the *Watson* opinion in the cases of *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952) and *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190 (1960). In *Kedroff,* this Court discussed *Watson* at length, noting that the holding therein was based on general common law, and concluded:

> "The opinion radiates, however, a spirit of freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116.

In the recent case of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969), this Court cited and relied upon *Watson.* In this case, the state courts of Georgia had resolved the church property dispute by a jury determination of whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it.

This Court reversed and held:

> "* * * First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs

> of government for essentially religious purposes * * *." *Id.* at 449.

The Court in reaching its decision relied upon and quoted with approval from *Watson*. The Court said "The *Watson* Court * * * point[ed] out that it was wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions." *Id.* at 445. The Court concluded that it was proper for a civil court to adjudicate church property disputes *only* when it can do so without interpreting or weighing church doctrine "but simply by engaging in the narrowest kind of review of a specific church decision—i.e., whether that decision resulted from fraud, collusion, or arbitrariness. Such review does not inject the civil courts into substantive ecclesiastical matters." *Id.* at 451.

The most recent decision of this Court involving a church property dispute is *Maryland and Virginia Eldership of the Churches of God* v. *Sharpsburg*, 396 U.S. 367 (1970). In this case the Court wrote a *per curiam* opinion with Justice Marshall writing a concurring opinion. In the concurring opinion Justice Marshall states:

> "Thus the States may adopt the approach of Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666 (1872), and enforce the property decisions made within a church of congregational polity 'by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government,' *id.*, at 724 *and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue*, unless 'express terms' in the 'instrument by which the property is held' condition the property's use or control in a specified manner. *Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to con-*

> *trol the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.* Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the *Watson* approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.
>
> "'[N]eutral principles of law, developed for use in all property disputes,' *Presbyterian Church, supra,* 393 U.S. 440 at 449, 89 S. Ct. at 606, provide another means for resolving litigation over religious property. Under the 'formal title' doctrine, civil courts can determine clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues." (Emphasis added.) *Id.* at 368-370.

This Court has clearly stated and held that there are at least three doctrines which civil courts may constitutionally adopt in resolving church property disputes, namely:

1. The *Watson* v. *Jones* approach.

2. The neutral principles of law approach.

3. The approach of application of special state statutes governing church property, which statutes do not permit state inquiry into religious doctrine.

States are free to adopt any one or more of these approaches as their application does not involve courts in constitutionally forbidden ecclesiastical questions.

In this case the application of either *Watson* v. *Jones* or "neutral principles of law" (the third doctrine is not applicable in Indiana) results in a decision for Respondents.

The Court of Appeals of Indiana in applying the doctrine of *Watson* v. *Jones* determined that the Serbian Eastern Orthodox Church was hierarchical within the meaning of *Watson* v. *Jones,* that the local parish was a part of this hierarchy and that the property of the local parish was under the control of those who remained loyal to the Mother Church. The Court further held unconstitutional the determination of the trial court that the Mother Church was without authority to reorganize the Diocese because "[i]n reaching its decision the trial court had to probe deeply into the allocations of power within the church so as to decide where the religious law places control over the use of church property." Pet. App. p. 35. In reaching its decision, the Court of Appeals of Indiana carefully considered and properly applied the church property opinions of this Court and Serbian Church opinions arising out of this same basic fact situation.

It is important to note that Petitioners failed to even mention *Watson* v. *Jones* in their Petition in spite of the fact that it is a landmark case in church property disputes

and embodies the rule of law applied by the Court of Appeals of Indiana in the instant case.

In attacking the decision of the Court of Appeals of Indiana, Petitioners are inconsistent in that on the one hand they argue that the Court of Appeals of Indiana entered the "forbidden thicket" by examining the governing documents and making an initial determination that the Serbian Orthodox Church is hierarchical, while on the other hand they argue that the Court of Appeals erred by not examining and interpreting the several church constitutions to determine the allocation of power within the church structure. The Court of Appeals of Indiana did only what this Court held in *Sharpsburg, supra,* a civil court is permitted to do in identifying the governing body, and, having done so, determining that the decision by the highest church body is controlling with respect to the determination of an ecclesiastical matter, the reorganization of the Diocese.

It is undisputed that the Serbian Eastern Orthodox Church is hierarchical. Petitioners concede this fact and all of the Serbian Church cases arising out of this same basic fact situation have so found. While making this concession, Petitioners cling to the proposition that a civil court can and must study the church documents and construe them as prohibiting the Mother Church from reorganizing the Diocese. While it is unclear, it appears that Petitioners are urging that this is an application of "neutral principles of law." This argument of Petitioners is patently erroneous for at least three reasons. *First,* civil courts are not mandated to apply "neutral principles of law" but may appropriately use *Watson* v. *Jones,* as have the courts in most of the Serbian Church cases, including the Court of Appeals of Indiana in the instant case.

Second, the review and determination sought by Petitioners are in violation of the United States Constitution. *Third*, the application of "neutral principles of law" results in a decision for Respondents and not for Petitioners.

2. Other Serbian Church Decisions

There are a number of Serbian Church cases arising out of the same basic fact situation which have been litigated throughout the United States and Canada and in each case the application of the principle of *stare decisis* would result in a decision for Respondents.

All of these cases have recognized the hierarchical polity of the Serbian Eastern Orthodox Church and most cases have applied the doctrine of *Watson* v. *Jones* and awarded the church property to those persons who adhered to the decisions of the Mother Church.[1]

For example, in the Serbian Church case of *Serbian Orth. Cong of "St. George"* v. *Serbian East. Orth. Cong.*, 254 A.2d 119 (N.J. Sup., 1969) *cert. den.* 397 U.S. 961,

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[1]A final judgment was entered by the Supreme Court of Ontario in the case of *Mirkovich, et al. v. Bozanich, et al.* This case is unreported. We have reproduced the judgment and reasons for judgment in our Appendix at pp. 13-35 and have filed a certified copy thereof with the Clerk of this Court.

The Supreme Court of Ontario quoted extensively from *Watson* v. *Jones* and applied *Watson* in awarding the use of the land to those persons honoring the decisions of the Mother Church.

reh. den. 397 U.S. 1058 (1970) the New Jersey Superior Court held as follows:

> "Appellants take the stand that they remain members of the Serbian Orthodox Church, although not following it in the matters here involved. That church is an autocephalous hierarchical one which functions under the spiritual guidance of its Patriarch. Its highest body is the Holy Assembly of Bishops, upon whom rests the power to appoint and remove bishops. *The Holy Assembly which had appointed Bishop Dionisije has removed him as bishop and solemnly declared him to be no longer an Orthodox clergyman. We are assured by appellants that they do not ask us to review that action and we recognize that we may not do so.*" (Emphasis added.) *Presbyterian Church* v. *Hull Church, supra; Watson* v. *Jones, supra; Kreshik* v. *St. Nicholas Cathedral* (1960) 363 U. S. 190, 4 L. Ed. 2d 1140, 80 S. Ct. 1037 * * * *Id.* at 121.
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> * * *
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> "*Thus it would appear that the basic conclusions of the trial judge rest, not upon his determination of ecclesiastical questions whose determination by the courts may be inhibited by Presbyterian Church* v. *Hull Church or Watson* v. *Jones, but upon the recognition of decisions made by the highest authority of the mother church of which the Church of St. George was a constituent part from the time of its organization.* The resultant judgment leaves intact the congregation's constitution and by-laws, as they existed prior to the amendment excluding those not recognizing the old diocese. Since the constitution of the old diocese has been carried over into the new diocese, the relations between St. George's and the new diocese, and between the latter and the mother church, remain the same. (Emphasis added.) *Id.* at 122.

Further, many of these cases recognize and have held that civil courts may not constitutionally delve into the ec-

clesiastical question of the authority of the Mother Church to reorganize the Diocese.

Two of the Serbian Church cases speak directly to this point.

Serbian East. Orth. Cong. of "St. George" v. *Serbian East. Orth. Cong. supra,* held:

> "Likewise, under Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church we may not on this appeal review the validity of the action of the Holy Assembly of Bishops, acting under the authority of article 16 of the constitution of the mother church, in subdividing the old diocese * * *" *Id.* at 122.

Likewise, the Supreme Court of Ohio, in *Serbian Orth. Ch. Cong. of St. Demetrius* v. *Kelemen,* 256 N.E. 2d 212 (1970) in applying *Presbyterian Church in United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969) held that the *Hull Memorial* case "offers the strong suggestion that civil courts cannot constitutionally determine matters of church government," *id.* at 216, and the court then found that the reorganization of the U.S. and Canada Diocese by the Mother Church was a matter of church government.

The above language in these two cases is clearly correct and mandated by this Court. Under the authority of *Watson* v. *Jones, supra,* and subsequent decisions of this Court applying *Watson,* "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them in their application to the case before them." *Watson* v. *Jones, supra,* 80 U.S. (13 Wall.) at 726.

And as stated in *Sharpsburg, supra,* 396 U.S. at 369: "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."

Petitioners cite as authority for their position the pending case of *Serbian Eastern Orthodox Diocese* v. *Ocokoljich,* 72 Ill. App. 2d 444, 219 N.E. 2d 343 (1966) and they print in the App. to their Petition the trial court decision on remand. This case stands alone at present, among the Serbian Church cases, in its determination that the Mother Church was without authority to reorganize the Diocese. We strongly disagree with this determination as an unconstitutional infringement upon religion. While Petitioners cite this case, they cannot rely upon it because its application would result in a decision for Respondents herein, as the court honored the decisions of the Mother Church regarding the defrockment of Dionisije and the appointment of Bishop Firmilian as the administrator of the Diocese. See Pet. App. p. 54. As the decision is adverse to the Dionisije faction (Petitioners herein) they are presently appealing this trial court judgment to the Court of Appeals of Illinois, as are Bishop Firmilian's adherents.

Two of the Serbian Church cases have heretofore been before this Court on petitions for writs of certiorari, namely, the *"St. George"* case, *supra,* from the state of New Jersey and the *Kelemen* case, *supra,* from Ohio. This is most interesting in that the opinion and decision of the *"St. George"* case are almost identical to those of the Court of Appeals of Indiana and we have quoted portions of this opinion which set forth the findings and holding of the court, supra, p. 20. By contrast, the original Court of

Appeals opinion in *Kelemen,* while holding that the church property was to be occupied by those persons who recognized the authority of the Mother Church to appoint a new bishop, made the determination that the Mother Church did not have "the power to unilaterally divide the diocese into several dioceses." *Serbian Orth. Ch. Cong. of St. Demetrius* v. *Kelemen* (Ohio Ct. App., 1967) Slip opinion p. 7. The Supreme Court of Ohio affirmed.

This Court denied a petition for writ of certiorari in *St. George," supra,* 397 U.S. 961, on March 2, 1970. This Court granted a petition for writ of certiorari in *Kelemen, supra,* 393 U.S. 527, on February 24, 1969, vacated the judgment, and remanded the case "to the Supreme Court of Ohio for further consideration in light of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church." Ibid.* On remand, the Ohio Supreme Court reversed the Court of Appeals and remanded the case for further proceedings. 256 N.E. 2d 212 (1970). In reversing, the Ohio Supreme Court stated: "The Court of Appeals' factual findings regarding the name, incorporation, the hierarchical form of organization, and plaintiff's claim of autonomy from the Mother Church did not require a decision involving church doctrine or tenets." *Id.* at 216. However, the Ohio court held that legal conclusions by the Court of Appeals relative to the powers and duties of the Mother Church concerning the appointment of a bishop for the diocese of the United States and Canada and elimination of the diocese required an examination of church doctrine and tenets. On remand to the Court of Appeals of Ohio, it held "the church properties herein are subject to the control of the voting members of the church of St. Demetrius, and along with the majority decision of such members as of the year 1962 will pass the right to

use the name of St. Demetrius." *Serbian Orth. Ch. Cong. of St. Demetrius* v. *Kelemen* (Ohio Ct. App., 1971) Slip opinion p. 14.

This Court denied a petition for writ of certiorari of this case, 400 U.S. 827 (1970).

The opinion by the Court of Appeals of Indiana, of which Petitioners complain, examined church documents for the limited purpose of determining that the Serbian Eastern Orthodox Church is hierarchical in the sense of *Watson* v. *Jones* and awarding use of the church property to the members who adhered to the decisions of the Mother Church. The *"St. George"* decision examined the same church documents for this exact purpose and determination. The opinion of the Court of Appeals of Indiana cites and relies upon the *"St. George"* decision. We submit that this Court has tacitly approved the *"St. George"* opinion by its denial of certiorari, in light of the granting of certiorari in *Kelemen.*

D. The Same Result Would Be Reached in this Case by Application of "Neutral Principles of Law"

Petitioners appear to contend that civil courts may not use *Watson* but are mandated to apply "neutral principles of law." This contention is false. However, assuming *arguendo* the correctness of their position, it avails them nothing because Respondents would still win judgment in this case.

The application of neutral principles of law was the alternate position and argument of Respondents in the Indiana courts. Article 147 of the Diocesan Constitution provides: "The property of the church-school congregation in individual colonies belongs exclusively to the said con-

gregation without diocesan rights to the same * * *." As previously noted, the membership of the local parish voted, by a vote of 194 to none, to remain in continued unity with the Mother Church. This was the basis for the dictum by the Court of Appeals of Indiana that: "We do not deem it necessary to do so, but the same result could be reached, which we reach here, under the so-called formal title approach [also referred to as neutral principles of law] mentioned in the *Sharpsburg, Kelemen, Merryman* v. *Price,* and *Dragelevich* cases." Pet. App. p. 38. This was also the basis for the following statement by Judge Hoffman in his separate opinion to Petitioners' Petition for Rehearing before the Court of Appeals of Indiana: "Although I agree with the result reached in the opinion previously handed down * * *, I am not in full accord with the reasoning therein." Pet. App. p. 41. Judge Hoffman then cites *Kelemen, supra,* 256 N.E. 2d 212 and states, "Following that guide the church properties in the case at bar should be subject to the control of the voting members of the church and the majority decision of such members should have the control and use of the church properties." Pet. App. p. 42.

CONCLUSION

We respectfully submit that this Court has no jurisdiction to consider Petitioners' Petition because they failed to timely raise the purported federal question and the question they raise is not federal.

Without waiving the jurisdictional question, Respondents submit the Court of Appeals of Indiana properly based its decision on the *Watson* doctrine, one of the approaches to resolving church property disputes permitted by decisions of this Court.

If this Court should overrule the applicability of *Watson* and mandate the use of "neutral principles of law" in resolving church property disputes, the result in this case would be the same.

For the reasons set forth in this Brief, we ask this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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